

Regulatory Impact Analysis and
Initial Regulatory Flexibility Analysis

Proposed Rule

Lacey Act Implementation, Definitions for Exempt and
Regulated Articles

APHIS 2009-0018

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Animal and Plant Health Inspection Service

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Summary

Recent amendments to the Lacey Act expanded its protections to a broader range of plant species, extended its reach to encompass products, including timber, that derive from illegally harvested plants, and require that importers submit a declaration at the time of importation for certain plants and plant products. Common cultivars and common food crops are among the categorical exemptions to the provisions of the Act. The Act does not define the terms “common cultivar” or “common food crop,” but instead gives authority to the U.S. Department of Agriculture and the U.S. Department of the Interior to define these terms by regulation. This proposed rule provides these definitions.

To the extent that the proposed rule defines which products are exempted from the provisions of the Act, it would benefit U.S. importers, large and small.¹ By defining the terms “common cultivar” and “common food crop,” the proposed rule would facilitate importer understanding of and compliance with the Act’s requirements.

“Common cultivar” and “common food crop” are defined in this proposed rule to ensure that the exemptions do not place at risk plants of conservation concern. The definitions are also consistent with the terms’ existing and commonly understood definitions. Since the terms have not previously been defined, there should be no instances in which an importer would be required because of this rule to make declarations for commodities that are not now being declared. In other words, the definitions presented in this rule and the related exemptions should not result in additional costs for importers based on their current activities. On the other hand,

¹ Enforcement of the declaration requirements is being phased in utilizing categories from the Harmonized Tariff Schedule (HTS) of the United States. Only a limited number of product categories are currently being enforced. Therefore, some products that are not exempted under the Act can currently enter the United States without a declaration. Conversely, a small number of declarations are currently being filed for commodities that are either common cultivars or common food crops under the proposed definitions.

the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service has estimated that about 5 percent of declarations being made under the current stage of phased in enforcement of the Act are either for common cultivars or common food crops that would be exempted under the proposed definitions. The costs incurred in making these declarations are a measure of the expected benefits of the rule. We estimate the total annual cost savings associated with these declarations alone would be between \$900,000 and \$2.8 million. Note that the full implementation of the declaration requirement would cover far more product categories than currently require a declaration.

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Introduction

The Lacey Act, as amended, makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken in violation of any Federal, State, tribal, or foreign law that protects plants. The Lacey Act also requires import declarations for certain plants and plant products and makes it unlawful to make or submit any false record, account, or label for, or any false identification of, any plant covered by the Act.² Common cultivars and common food crops are among the categorical exemptions to the provisions of the Act, but are not defined within the Act.

The Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and the Department of the Interior's Fish and Wildlife Service are proposing to establish definitions for the terms "common cultivar" and "common food crop."³ These proposed definitions would specify which plants and plant products are subject to the provisions of the Act, including the declaration requirement.

² The declaration must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant, and name of the country where the plant was harvested. For paper and paperboard products containing recycled content, the declaration also must include the average percent of recycled content without regard for species or country of harvest.

³ The proposed definitions are as follows:

Common cultivar. A plant (except a tree) that:

- (a) Has been developed through selective breeding or other means for specific morphological or physiological characteristics; and
- (b) Is a species or hybrid that is cultivated on a commercial scale; and
- (c) Is not listed: (1) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249); (2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or (3) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Common food crop. A plant that:

- (a) Has been raised, grown, or cultivated for human or animal consumption; and
- (b) Is a species or hybrid that is cultivated on a commercial scale; and;
- (c) Is not listed:(1) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249); (2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or (3) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Benefits and costs of the rule are examined in accordance with Executive Order 12866, and the benefits are expected to exceed the costs overall. Possible impacts on small entities are considered in accordance with the Regulatory Flexibility Act.

Benefits and Costs of the Rule

The recent amendments to the Act impose the declaration requirement on imports of plants and plant products and create three categories of plants that are exempt from the provisions of the Act: (1) Common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (2) Scientific specimens of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that are to be used only for laboratory or field research; and (3) Plants that are to remain planted or to be planted or replanted.⁴ Since the declaration requirement and the exemptions were established directly in the 2008 Farm Bill, their existence, *per se*, is not a matter for consideration in the proposed rule or in this analysis.⁵ Our analysis is of the expected benefits and costs of the proposed definitions of “common cultivar” and “common food crop.”

To the extent that the proposed rule defines which products are exempted from the provisions of the Act, it would benefit U.S. importers. By defining “common cultivar” and “common food crop,” the proposed rule would facilitate importer understanding of and compliance with the Act’s requirements.

⁴ Exclusions 2 and 3 do not apply if the plant is listed: in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); or as an endangered or threatened species under the Endangered Species Act of 1973; or pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

⁵ The public comments received in response to APHIS’ published notices of October 8, 2008 and February 3, 2009 in Docket No. 2008-0119 contain little in the way of substantive data on the cost of complying with the declaration requirement. However, those comments indicate that, for some importers, the requirement could be burdensome.

Enforcement of the declaration requirements is being phased in utilizing categories from the Harmonized Tariff Schedule of the United States (HTS). The phase-in schedule is largely based on the degree of processing and complexity of composition of the affected products. The declaration requirements for products in parts of HTS Chapters 44, 66, 82, 92, 93, 94, 95 and 97, are the only requirements currently being enforced.⁶ Therefore, some products that are not exempted under the Act can currently enter the United States without a declaration.

Importers of a small number of products that would be exempt based on the definitions proposed in this rule may currently be filing declarations upon entry of their products into the United States. Importers of those products would benefit from this rule.

Under the current stage of enforcement of the Lacey Act, 9,200 declarations per week have been filed on average. It is estimated that about 5 percent of these declarations are being filed for commodities that are either common cultivars or common food crops under the proposed definitions. The cost incurred in making these declarations is one measure of the expected benefits of the rule. The costs to those filing these declarations include the labor cost to collect and maintain the necessary data and to complete and review the paperwork, the cost of postage for paper declaration submissions, and the cost of the automated broker interface (ABI) fees for electronic declaration submissions. In addition, there are government costs for processing those declarations. We estimate the total annual cost savings would be between

⁶ Enforcement of the declaration requirement for goods in 4401-fuel wood; 4403-wood in the rough; 4404-hoopwood; poles, piles, stakes; 4406-railway or tramway sleepers; 4407 wood sawn or chipped lengthwise; 4408 sheets for veneering; 4409-wood continuously shaped; 4417-tools, tool handles, broom handles; and 4418-builders' joinery and carpentry of wood began on April 1, 2009. For 4402-wood charcoal; 4412 plywood, veneered panels except 44129906 and 44129957; 4414-wooden frames; 4419-tableware & kitchenware of wood; and 4420 wood marquetry, caskets, statuettes enforcement began on Oct. 1, 2009. For 4421-other articles of wood; 6602 walking sticks, whips, crops; 8201-hand tools; 9201-pianos; 9202-other stringed instruments; 9302-revolvers and pistols; 93051020-parts and accessories for revolvers and pistols; 940169-seats with wood frames; 950420-articles and accessories for billiards; and 9703-sculptures enforcement began on April 1, 2010.

\$900,000 and \$2.8 million. These estimated cost savings are based on 23,920⁷ annual declarations that would not need to be filed, 1.5 hours of management time per declaration for data collection, completion and review of each declaration,⁸ postage costs of \$0.44 per paper declaration, ABI fees of between \$10 and \$30 per electronic declaration,⁹ and salary and benefits for 2.3 government declaration processing positions.¹⁰

Note that the full implementation of the declaration requirement would cover far more product categories than currently require a declaration. We cannot predict the total number of declarations that would occur under full implementation.

Since the terms “common cultivar” and “common food crop,” while not yet defined by regulation, were previously included in the statute, there should be no instances in which an importer would be required because of this rule to make declarations for commodities that are not now being declared. In other words, the definitions presented in this rule and the related exemptions should not result in additional costs for importers based on their current activities.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. Section 603 of the Act requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis that describes expected impacts of a proposed rule on small entities.

⁷ Five percent of 9,200 total declarations per week over an entire year.

⁸ The cost of this management time is based on the range in median hourly compensation for various management occupations, not including chief executives, of between \$15.55 and \$55.08. Bureau of Labor Statistics, May 2009 National Occupational Employment and Wage Estimates.

⁹ Based on various industry sources for brokerage service fees.

¹⁰ Based on GS-5 step 5 or GS-7 step 5 salaries and benefits, and each employee processing 200 declarations per week.

Reasons Action is Being Considered

Recent amendments to the Lacey Act expanded its protections to a broader range of plant species, extended its reach to encompass products, including timber, that derive from illegally harvested plants, and require that importers submit a declaration at the time of importation for certain plants and plant products. Common cultivars and common food crops are among the categorical exemptions to the provisions of the Act. The Act does not define the terms “common cultivar” and “common food crop” but instead gives authority to the U.S. Department of Agriculture (USDA) and the U.S. Department of the Interior (DOI) to define these terms by regulation. This proposed rule is intended to provide these definitions.

Objectives of and Legal Basis for the Rule

The definitions are designed to ensure that the exemptions do not place at risk plants of conservation concern, while exempting plants that are grown on a commercial scale. The definition for “common cultivar” is consistent with the definition of “cultivar” contained in the CITES regulations promulgated by the DOI’s Fish and Wildlife Service, with additional phrasing added in order to limit the definitions to “common” exemplars. The definition for “common food crop” was developed with consideration of common dictionary definitions and terms in commercial use. In both definitions, the exceptions for endangered and threatened species are consistent with the provisions of the Act.

Potentially Affected Small Entities

The Small Business Administration (SBA) has established guidelines for determining which entities are to be considered small. Plants and plant products, such as fruits, vegetables, and nursery stock are imported into this country for commercial purposes, for research, for education, and by hobbyists and collectors and are covered under the Act. In addition, many less obvious products, such as cotton shirts and pharmaceuticals, contain plant products and are also

covered under the Act. Therefore, the importers potentially affected by the proposed rule represent a broad cross section of U.S. businesses, government and university research institutions, non-profit operations, and individuals.

Importers of plants and plant products are primarily identified within the wholesaling sector of the U.S. economy. Importers either sell goods on their own account (import merchants) or arrange for the sale of goods owned by others (import agents and brokers). Importers fall into the North American Industrial Classification System (NAICS) sector 42. In particular, fruit and vegetable importers are in sector 424480, fresh fruit and vegetable wholesale. Importers of frozen fruits and vegetables are part of NAICS sector 424420, packaged frozen food wholesale. Importers of flowers and nursery stock are part of NAICS 424930, flower, nursery stock & florists' supplies wholesale. Importers of seeds are part of NAICS 424910, farm supplies wholesale.

In 2007, the average wholesaling establishment had revenues of \$15 million. Fresh fruit and vegetable wholesalers had average revenues of \$12.4 million, packaged frozen fruit wholesalers had average revenues of \$25.1 million, flower, nursery stock and florist supplies wholesalers had average revenues of \$2.8 million, and farm supply wholesalers had average revenues of \$9.5 million.¹¹

A firm primarily engaged in wholesaling commodities is considered small if it employs not more than 100 persons. In 2002, more than 98 percent of all wholesaling establishments were considered small.¹² About 95 percent of fruit and vegetable wholesalers and packaged frozen food wholesalers were considered small. More than 97 percent of flower, nursery stock &

¹¹ U.S. Department of Commerce, U.S. Census Bureau, 2007 Economic Census.

¹² Data on the employment size of establishments is not yet available in the 2007 Economic Census.

florists' supplies wholesalers were considered small and nearly 98 percent of farm supply (seed) wholesalers were considered small.

Entities conducting research and experimental development on plants and plant products may also be affected by the proposed rule and are part of NAICS sector 541712, research and development in the physical, engineering, and life sciences. In 2002, entities in this sector had an average of \$6 million in revenues.¹³ A business concern primarily engaged in research is considered small by the SBA if it employs no more than 500 persons. Firms involved in research and development in the life sciences comprise NAICS sector 5417102. About 98 percent of these firms were considered small in 2002.

Research and experimental development also occurs at educational institutions and they may also be affected by the proposed definitions. Elementary and secondary schools, junior colleges, Colleges and universities are considered small if they have annual revenues of \$6.5 million or less. We do not currently have enough information to determine the number of elementary and secondary schools that would be considered small. However, in 2001-02, the average elementary/secondary school had annual revenues of about \$4.4 million. Therefore, the average school would be considered small. According to data from the Department of Education, about 20 percent of colleges and universities were considered small in 1996.

Zoos and museums also import plants and plant products. Zoos and botanical gardens are classified in NAICS sector 712130. In 2002, zoos and botanical gardens exempt from Federal income tax had average revenues of \$4.7 million, while those institutions subject to Federal income tax had average revenues of \$1.6 million. Museums are classified in NAICS sector 712110. In 2002, museums exempt from Federal income tax had average revenues of \$1.5

¹³ Data from the 2007 Economic Census is not yet available for some categories.

million, while those museums subject to Federal income tax had average revenues of \$1.2 million. Museums and zoos are considered small if they have annual revenues of \$6.5 million or less. Between 94 and 97 percent of museums and between 83 and 90 percent of zoos and botanical gardens were considered small in 2002.¹⁴

From the above it is clear that the vast majority of potentially affected entities would be considered small. To the extent that the proposed rule defines which products are exempted from the provisions of the Act, it would benefit U.S. importers, large and small.¹⁵ By defining the terms “common food crop” and “common cultivar,” the proposed rule facilitates importer compliance with the Act’s requirements.

We invite public comment on the proposed rule - including any comment on the expected impacts for small entities, and on how the proposed rule could be modified to reduce any costs or burdens for small entities consistent with the Act. Any comment suggesting changes to the proposed definitions should be supported by a science-based explanation of why the changes should be considered.

Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule contains, under the heading “Paperwork Reduction Act,” a description of the information collection and recordkeeping requirements associated with the proposed rule.

¹⁴ Ibid.

¹⁵ Enforcement of the declaration requirements is being phased in utilizing categories from the Harmonized Tariff Schedule of the United States. Only some product categories are currently being enforced. Therefore, some products that are not exempted under the Act can currently enter the United States without a declaration. Conversely, a small number of declarations are currently being filed for commodities that are either common cultivars or common food crops under the proposed definitions.

Duplication, Overlap, or Conflict with Existing Rules and Regulations

APHIS has not identified any duplication, overlap, or conflict of the proposed rule with other Federal rules.

Alternatives to Minimize Significant Economic Impacts of the Rule

“Common cultivar” and “common food crop” are defined in this proposed rule to ensure that the exemptions do not place at risk plants of conservation concern. The definitions are also consistent with the terms’ existing and commonly understood definitions. Since the terms were already included in the statute prior to the proposed rulemaking, there should be no instances in which an importer would be required because of this rule to make declarations for commodities that are not now being declared. In other words, the definitions presented in this rule and the related exemptions should not result in additional costs for importers based on their current activities. On the other hand, APHIS has estimated that about 5 percent of declarations being made under the current stage of phased in enforcement of the Act are either for common cultivars or common food crops that would be exempted under the proposed definitions. The costs incurred in making these declarations are a measure of the expected benefits of the rule. In the absence of significant economic impacts that would harm importers, we have not identified alternatives that would minimize such impacts.